

APR 12 1979

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. **78-1650**

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
SILVERGATE DISTRICT LODGE 50, An Association,

Petitioner.

v.

DAVID ANDERSON,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

OLINS & FOERSTER
By: DOUGLAS F. OLINS
2718 Fifth Avenue
San Diego, California 92103
Telephone: (714) 297-7030

Counsel for Petitioner,
Silvergate District Lodge 50,
International Association of
Machinists and Aerospace
Workers, AFL-CIO

- i -

TOPICAL INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF CASE	5
REASONS FOR GRANTING THE WRIT	10
I. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISION IN <i>TRANS WORLD AIRLINES, INC. v. HARDISON</i> , 432 U.S. 63 (1977)	10
II. THE INTERPRETATION OF TITLE VII IN THE "DUES AREA" BY THE COURT OF APPEALS RESULTS IN IMPORTANT AND RECURRENT NATIONWIDE PROBLEMS IN THE ADMINISTRATION OF VALID UNION SECURITY CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS	14
III. THE DUTY OF REASONABLE ACCOMMODATION MANDATED BY TITLE VII VIOLATES THE ESTABLISH- MENT CLAUSE OF THE FIRST AMENDMENT	19

TOPICAL INDEX (Continued)

Page

IV. THE CREATION OF A DE NOVO REVIEW BY THE COURT OF APPEALS IN VIOLATION OF RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCE- DURE AND THE ERRONEOUS NATURE OF THE DECISION BELOW REQUIRE THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO AVOID RECURRENT PROBLEMS	25
CONCLUSION	30
APPENDICES	31
Memorandum and Judgment of the United States District Court for the Southern District of California in Anderson v. General Dynamics Convair Aerospace Division, Case No. 75-0857-S (February 15, 1977)	A-1
Opinion of the United States Court of Appeals for the Ninth Circuit in Anderson v. General Dynamics Convair Aerospace Division, Case No. 77-2180 (September 7, 1978)	B-1

TABLE OF AUTHORITIES

Page

CASES

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973)	20
Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), affirmed by an equally divided court, 429 U.S. 65 (1976), vacated for further consideration, 433 U.S. 903 (1977)	14,19,24
Everson v. Board of Education, 330 U.S. 1 (1947)	19
Gavin v. Peoples Natural Gas Co., ____ F.Supp. ___, 20 DLR D-1 (Lab. Rel. Rep. (BNA)) (E.D. Pa. 1979)	24
Hardison v. Trans World Airlines, Inc., 527 F.2d 33 (8th Cir. 1975)	10
Lemon v. Kurtzman, 403 U.S. 602 (1971)	22
National Labor Relations Board v. Catholic Bishop of Chicago, 559 F.2d 1112 (7th Cir. 1977), affirmed ____ U.S. ___, 39 CCH S.Ct. Bull. P. B1560 (March 21, 1979)	22,23, 24,29
National Labor Relations Board v. General Motors Corp., 373 U.S. 734 (1963)	16
Otten v. Baltimore & O. R. Co., 205 F.2d 58 (2nd Cir. 1953)	24

TABLE OF AUTHORITIES (Continued)

	Page
CASES (Continued)	
Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17 (1954)	16
Rohr v. Western Electric Co., Inc., 567 F.2d 829 (8th Cir. 1977)	14
Southern Pacific Transportation Co. v. Burns, 11 FEP Cases 1441 (DC Ariz. 1976), Rev'd, 589 F.2d 403 (1978), cert. denied, 99 S.Ct. 843 (1979)	27,28,29
Torcaso v. Watkins, 367 U.S. 488 (1961)	21
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)	10,11,12, 13,14
United States v. Yellow Cab Co., 338 U.S. 338 (1949)	25
Walz v. Tax Commission, 397 U.S. 664 (1970)	22
Wondzell v. Alaska Wood Products, Inc., 583 P.2d 860 (Alaska Supreme Ct. 1978)	11
Yott v. North American Rockwell Corp., 501 F.2d 398 (9th Cir. 1974)	11,16, 26,27
Yott v. North American Rockwell Corp., 428 F.Supp. 763 (C.D. Cal. 1977)	24
Zorach v. Clauson, 343 U.S. 306 (1952)	21

TABLE OF AUTHORITIES (Continued)

	Page
CONSTITUTION, STATUTES AND REGULATIONS	
United States Constitution, First Amendment	2,9,22, 23,24,29
28 U.S.C. § 1254(1)	2
29 U.S.C. § 158(a)(3)	3,11,15,16
29 U.S.C. § 159(a)	4,6,17
29 U.S.C. § 169	16
42 U.S.C. § 2000e	2,3,4,5,8, 14,19
EEOC Regulation 1605.1(c)	19
Federal Rules of Civil Procedure, Rule 52(a)	4,25,27
OTHER AUTHORITIES	
44 Fordham L. Rev. 442 (1975)	22
118th Cong. Rec., S 227-229 (1/21/72)	21

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. _____

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
SILVERGATE DISTRICT LODGE 50, An Association,

Petitioner.

v.

DAVID ANDERSON,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioners, General Dynamics Convair Aerospace Division and Silvergate District Lodge 50, International Association of Machinists and Aerospace Workers, AFL-CIO, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on September 7, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 589 F.2d 397. The opinion rendered by the District Court for the Southern District of California is reported at 430 F.Supp. 418. Both opinions are set forth in the appendix.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its opinion and judgment on September 7, 1978. A timely petition for rehearing en banc was denied on January 16, 1979, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the duty of reasonable accommodation mandated by § 701(j) of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e(j)), violates the Establishment Clause of the First Amendment.
2. Whether the duty of reasonable accommodation in the "dues area" requires a union to violate its collective bargaining agreement in order to accord preferential treatment to religious objectors of union security clauses.

STATUTORY PROVISIONS INVOLVED

The union security provisions of the National Labor Relations Act, as amended, § 8(a)(3), 29 U.S.C. § 158(a)(3), provide in relevant part:

[N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment. . . .

The second provision of § 158(a)(3) allowing for "financial core" membership provides in relevant part:

[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., as amended, provides in relevant part as follows:

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . .
42 U.S.C. § 2000e-2(a)(1)

It shall be an unlawful employment practice for a labor organization . . . (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. 42 U.S.C. § 2000e-2(c)(3).

For purposes of this subchapter . . . [T]he term "religion" includes all aspects of religious observances and practices, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j).

Rule 52(a), Federal Rules of Civil Procedure, provide in relevant part:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The National Labor Relations Act, as amended, 29 U.S.C. § 159(a), provides in relevant part:

[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect. . . .

STATEMENT OF CASE

On October 3, 1975, David Anderson (hereinafter referred to as "Respondent") instituted this action in the District Court for the Southern District of California against his employer, General Dynamics Convair Aerospace Division (hereinafter referred to as "General Dynamics") and Silvergate District Lodge 50, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as the "Union").

The jurisdiction of the District Court was invoked pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et seq.

This case involves the termination of respondent by General Dynamics pursuant to the request of the Union, for his failure to join or contribute to the Union. Respondent claimed a violation of Title VII of the Civil Rights Act of 1964, as amended, based upon Petitioners' failure to accommodate his religious beliefs.

Respondent was employed on a regular basis by General Dynamics from October 11, 1956, until June 16, 1972. However, he was terminated and reinstated twice during that period for reasons discussed below. Since 1959, respondent has been a member of the Seventh Day Adventist Church. It is a tenet and basic principle of this Church that its members should not belong to any labor union. Although the decision not to join or support a labor organization is left to the individual church member, respondent has, during the pendency of the instant case, adhered to the conviction that joining or contributing to a labor union violates the tenet of the Church.

Between 1959 and April 3, 1972, the collective bargaining agreement between the petitioners did not require that employees of General Dynamics become members of the Union. As a result, respondent was able to work for General Dynamics during this period without belonging to the Union.

On two occasions during that period (in 1962 and 1968), respondent was terminated by General Dynamics for refusing to work on the Sabbath of the Seventh Day Adventist Church. On both of those occasions, respondent utilized the Union's grievance procedure to secure reinstatement even though he was not a Union member, had never contributed financially to the Union and could have sought reinstatement on his own as sanctioned by the National Labor Relations Act, as amended, 29 U.S.C. § 159(a). Respondent sought Union assistance and the Union processed his grievances in accordance with its statutory duty to represent all employees in the bargaining unit regardless of membership in the Union.

During respondent's employment with General Dynamics, he accepted wage increases and other benefits that the Union had bargained for, as well as made use of the upgrade review process in the collective bargaining agreement. In addition, on one occasion, a Union representative prevented respondent from being unfavorably transferred and, on another occasion, assisted respondent with a contractual disciplinary warning.

On April 3, 1972, the petitioners entered into their first union security agreement which required that all employees become members of the Union. Article 9, Paragraph B of the Agreement provides as follows:

Any employee on the company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above.

Through conversations with a Union committeeman, respondent was informed and understood that he would not have to participate in the Union's functions, but only pay his dues. When respondent refused to join or financially contribute to the Union, the Union committeeman suggested a charity substitution to which respondent would not consent.

Respondent ultimately claimed that he had religious objections to joining or contributing to the Union, and did not join the Union within the time prescribed by the union security clause.

On May 25, 1972, the Union notified respondent as to his delinquency relative to the requirements of the union security provisions. Thereafter, on June 12, 1972, respondent informed General Dynamics, who in turn informed the Union, that his religious beliefs prohibited him from joining the Union. Two days later, the Union sent a letter to General Dynamics requesting that respondent be discharged for failure to join the Union. On or about June 14, 1972, upon receiving notice that he would be terminated unless he joined the Union, respondent again informed General Dynamics that his religious convictions would not allow him to join the Union.

On June 16, 1972, respondent was terminated by General Dynamics.

On September 27, 1972, respondent filed a Charge of Discrimination against both petitioners with the Equal Employment Opportunity Commission (EEOC). On November 6, 1972, the EEOC deferred the complaint to the California Fair Employment Practice Commission. The matter was referred back to the EEOC on December 6, 1972, and on April 12, 1974, a decision was entered finding reasonable cause to believe that respondent was entitled to relief.

On July 15, 1975, the EEOC notified respondent that conciliation efforts had failed and a "Notice of Right to Sue Within 90 Days" was received by respondent on October 14, 1975.

On October 3, 1975, respondent sued General Dynamics and the Union in the United States District Court for the Southern District of California alleging a violation of Title VII of the Civil Rights Act of 1964, as amended, for failure to accommodate his religious beliefs. [42 U.S.C. § 2000e(j)]

The District Court found in favor of petitioners General Dynamics and the Union concluding that anything less than payment of the equivalent of dues to the Union for charitable purposes would result in undue hardship to the Union. The Court recognized that non-payment of dues or their equivalent deprives the Union of the money it needs to negotiate for the benefit of employees and money to which it is entitled for services rendered. The Court also noted that the payment of money to a charity does not eliminate "free riders."

Based on the facts presented, the Court concluded that the respondent's refusal to give the equivalent of dues to the Union to be paid to a charity of respondent's choice, was based on his general distrust of unions, rather than on religious beliefs. Recognizing the overriding interest of the Union in carrying out its bargaining function with sufficient funds, the Court held that accommodation under the circumstances of this case was impossible because of respondent's unyielding position. The Court declined to reach the Union's claim that the reasonable accommodation provision of Title VII violates the Establishment Clause of the First Amendment to the United States Constitution.

Respondent appealed this decision and the Court of Appeals for the Ninth Circuit reversed. Despite the evidence produced by the Union, the Court concluded that the hardships to the Union resulting from the loss of respondent's dues and the problems in industry created by "free riders" were only hypothetical. Therefore, the Court ruled that General Dynamics and the Union failed in their burden to establish undue hardship. The Court declined to address the question of whether the reasonable accommodation provision of Title VII violates the Establishment Clause of the First Amendment.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISION IN *TRANS WORLD AIRLINES, INC. v. HARDISON*, 432 U.S. 63 (1977)

In *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), the Court of Appeals for the Eighth Circuit held that an employee, who was unable to work on Saturday without violating the tenets of his religion, should have been accommodated by his employer even though this would have violated the seniority provisions of the collective bargaining agreement. In reversing the Court of Appeals, this Court held that the duty of accommodation under Title VII of the Civil Rights Act did not require the employer to violate an otherwise valid collective bargaining agreement. This Court held:

[W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 79.

There is no reason to distinguish between the seniority provisions of the collective bargaining agreement in *Trans World Airlines* and the Union security provision of the bargaining agreement in the instant case. As with the seniority provision of the collective bargaining agreement in *Trans World Airlines*, the union security provision of the collective bargaining agreement in the instant case bears the imprimatur of congressional approval. The National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3), provides the authorization for companies and unions to negotiate union security provisions in a collective bargaining agreement. Just as with seniority provisions, Congress recognized that union security provisions play an integral part in stable labor relations and industrial peace. See *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974); *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860 (Alaska Supreme Ct. 1978).

This Court recognized in *Trans World Airlines* that requiring TWA to violate its seniority provisions to give Hardison Saturdays off could only be done at the expense of other employees who may have had strong, but perhaps nonreligious reasons for not working weekends. This Court held that "Title VII does not require an employer to go that far." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 81. In the instant case, the Court of Appeals for the Ninth Circuit would have those employees who do not object to union security clauses for religious reasons make up the loss of fees from those employees who refuse to contribute. This would occur because it would be impossible for the Union, whose only source of income is initiation fees and dues, to continue to represent all employees without charging more from those

who do contribute. This Court does not require a union to go this far.

In *Trans World Airlines*, this Court held that TWA had satisfied its burden of reasonable accommodation by meeting with Hardison several times to find a solution, by accommodating his special religious holidays and by authorizing the union steward to search for someone to swap shifts with Hardison.

In the instant case, the Union representative, Matson, discussed possible solutions with respondent several times. Matson explained that respondent was only obligated to pay dues and was not required to participate in Union activities at any time. Matson informed respondent that several members of respondent's own Church had found this position acceptable but respondent refused this proposed accommodation. Matson also discussed the possibility of a charity substitution to which respondent adamantly refused. It was because of respondent's unyielding position that the District Court held that no accommodation was possible. In addition, General Dynamics and the Union had accommodated respondent's special religious holidays as well as his Sabbath. The Union did not offer respondent a total exemption from paying dues or its equivalent because to do so would violate the union security provision of its collective bargaining agreement. Like TWA, the Union has satisfied its duty of reasonable accommodation.

One of the bases for this Court's decision in *Trans World Airlines* was the absence of any discriminatory intent by TWA against Hardison. This Court stated, "Thus, absent a discriminatory purpose, the operation of a seniority system

cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Id.* at 82.

As in *Trans World Airlines*, there is no evidence whatsoever in the instant case of any intent by the Union to discriminate against respondent. In fact, the evidence shows that the Union aided respondent on several occasions. In 1962 and 1968, the Union got respondent reinstated after he lost his job for refusing to work on the Sabbath. The Union also acted on respondent's behalf when he was faced with an unfavorable transfer and again when he was faced with a contractual disciplinary warning. In addition, respondent, like all employees, benefited from the Union's efforts to obtain better wages, hours and working conditions.

In *Trans World Airlines* this Court held that to require TWA to permit Hardison to work a four day week causing other shop functions to suffer, or to fill Hardison's Saturday shift with personnel charging premium overtime pay or to arrange a swap of shifts in violation of the seniority provisions would constitute undue hardship on TWA within the meaning of the statute. This Court stated, "[T]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84.

In the instant case, the Court of Appeals ignored the hardship to the Union caused by the loss of dues. Because dues are the Union's sole source of income, their loss threatens the Union's very existence. Loss of dues was particularly critical in this case because the Union was operating at a deficit during all relevant times. In addition, it is not just one individual's dues which will be lost to the Union, but many. Indeed, the majority of this Court in *Trans World Airlines*

recognized that a court has to "take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working Saturdays or Sundays." *Id.* at 84, n. 15.

The Court of Appeals also ignored the other hardships to the Union caused by "free riders" including the resentment of other employees, loss of solidarity and disruption of production. The Court of Appeals attempts to brush aside the very problems considered so serious by Congress that union security clause legislation was passed to prevent them.

Finally, the Court of Appeals ignored the fact that the Union's grant of preferential treatment to a religious objector would be a direct violation of its union security agreement. The Court of Appeals has required the Union to suffer undue hardship in order to accommodate respondent in violation of this Court's holding in *Trans World Airlines*.

II.

THE INTERPRETATION OF TITLE VII IN THE "DUES AREA" BY THE COURT OF APPEALS RESULTS IN IMPORTANT AND RECURRENT NATIONWIDE PROBLEMS IN THE ADMINISTRATION OF VALID UNION SECURITY CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS

The vast majority of cases which have arisen under § 701(j) of Title VII are Sabbatarian cases. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Rohr v. Western Electric Company, Inc.*, 567 F.2d 829 (8th Cir. 1977); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), affirmed by an

equally divided Court, 429 U.S. 65 (1976), vacated for further consideration, 433 U.S. 903 (1977). These cases involve situations in which an employee refuses to work on the Sabbath of his religion. Accommodating a Sabbatarian involves a rearrangement or readjustment of work schedules which can frequently be done with little or no impact on the union or on the employer's business. If employee grumbling or dissatisfaction results, it is generally limited to those employees who are directly affected by having to work for a religious objector on the Sabbath.

Accommodation in the fee area is a much more difficult task. Unlike Sabbatarian cases, a fee case strikes at the very heart of the union's existence because it presents a problem of a cutoff of the union's funds. The union's only source of income is initiation fees and dues. Any loss of these resources threatens the union's existence.

In addition, a fee case presents a conflict with the Congressional policy of having all employees pay their fair share of the costs of collective bargaining and administration of the union. Congress has sanctioned union security agreements as an integral part of our labor relations policy. The National Labor Relations Act, as amended, § 8(a)(3), 29 U.S.C. § 158(a)(3), provides in relevant part:

[N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment. . . .

The Second proviso to § 158(a)(3) reduces the union security clause to a simple obligation to pay a share of the cost of representation. It forbids an employer from discrimination against an employee for nonmembership in a labor organization

"if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

[Emphasis supplied]

Accordingly, the obligation upon respondent is only a limited financial obligation. He cannot be compelled to join the Union but only to pay his dues. Moreover, he does not have to participate in any of its activities. See *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734 (1963); *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954).

After studying the Congressional history of union shop agreements, the Court of Appeals in *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974), established that Congress did *not* intend Title VII to modify the National Labor Relations Act's authorization of union security clauses. The court also traced the Congressional history of attempts to enact exemptions to the union security provisions of the National Labor Relations Act. In 1974, Congress did provide an express exception to specifically accommodate religious beliefs in the health care field. See Section 19 of the National Labor Relations Act, as amended, 29 U.S.C. § 169. The fact that Congress limited the exception to the health care field clearly evidences a legislative intent to uphold union security agreements without exemptions in all other areas.

Congress' realization that all employees must be required to pay for the services of the union is highlighted in this case. Respondent has benefited over the years from the Union's efforts in getting better wages, hours and working conditions. Even more importantly, respondent benefited directly from Union efforts on his behalf in 1962 and 1968 when he was fired for refusal to work on his Sabbath. Even though respondent could have sought reinstatement on his own under 29 U.S.C. § 159(a), he requested the Union's help. The fund that respondent refuses to contribute to is the very fund which financed the Union's representation of him in 1962 and 1968 to get his job back.

The decision of the Court of Appeals places unions in an intolerable situation. Thousands of employees are covered by valid union security clauses of collective bargaining agreements under the National Labor Relations Act, as amended. To require a union to accommodate the religious idiosyncrasies of its thousands of members would pose insurmountable problems in maintaining adequate financial resources for its very existence.

Every time an individual refuses to pay union dues because of an alleged religious reason, the reasonable accommodation provision necessarily requires the union to spend time and money to determine whether the person's belief is part of an authentic religious creed, is sincerely held, and is the actual basis for the refusal to pay dues. With the number of religious sects increasing constantly, especially in California, and the plethora of other social, economic and philosophical reasons why a person may refuse to pay union dues, a union is forced to make an extensive and costly investigation to protect itself from Title VII suits and lost dues.

Further problems result because of the resentment against "free riders" which saps union solidarity and strength. To require dues-paying members to shoulder the expense of non-paying members is understandably unfair when non-paying members continue to receive the same benefits. Both in bargaining and administering an agreement, "free riders" destroy the very stability which union security clauses were designed to achieve.

The state of the law in the dues area is so uncertain today that unions do not know their rights and duties under Title VII. Does anything less than full payment of dues to the union constitute undue hardship? Does payment to a charity of an equivalent amount of union dues constitute reasonable accommodation? Does reasonable accommodation require that the employee be able to choose the charity which will benefit from his dues? Does the law require a union, under pain of a Title VII case like this, to attempt to accommodate an individual when it is obvious that the employee will not accept any accommodation? Questions like these are illustrative of the many recurring problems engendered by the Court of Appeals decision which will continue until this Court resolves the issues involved.

III.

THE DUTY OF REASONABLE ACCOMMODATION MANDATED BY TITLE VII VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion. . ." This Court on innumerable occasions has reiterated the following principle enunciated in *Everson v. Board of Education*, 330 U.S. 1 (1947):

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." *Id.* at 15-16.

Many jurists and commentators have questioned the constitutionality of the duty of reasonable accommodation mandated by Title VII § 701(j), 42 U.S.C. § 2000e(j) and EEOC Regulation 1605.1(c), the legal sources for the imposition of this duty. In *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975) (dissenting opinion), affirmed by an equally divided court, 429 U.S. 65 (1976), vacated for further consideration, 433 U.S. 903 (1977), the breach of the wall of separation was fully articulated:

By Regulation 1605.1 and by 42 U.S.C. § 2000e(j), the Federal Government has

breached the wall. The Regulation and § 2000e(j) grant preferences to employees by reason of their religion, forcing modifications in seniority systems, overtime scheduling, and other forms of employee organization. . . .

Exemption from uniform work rules for religious reasons has been recognized as an unfair and undue preference under collective bargaining agreements. [citations omitted]

Granting special privileges because of the exercise of one's religion is just as wrong as denying employment opportunity because of one's religious beliefs. When Government engages in either practice, it discriminates on the basis of religion and abandons its neutrality. *Id.* at 555-556.

Application of the three-part establishment test set forth in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) requires a finding that the reasonable accommodation provision of Title VII violates the Establishment Clause. In *Nyquist*, this Court stated that,

[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion. . . . *Id.* at 773 [citations omitted]

First, the reasonable accommodation provision lacks a "clearly secular legislative purpose." The legislative history

of the 1972 amendment creating the duty of reasonable accommodation reveals that the amendment was motivated by sectarian impulses rather than by a problem of religious discrimination in employment requiring remedial legislation. Remarks on the floor of the Senate by Senator Jennings Randolph indicate that the purpose of the amendment was to stem the "dwindling of the membership of some religious organizations" which require members to abstain from Saturday work. See 118th Cong. Rec., S 227-229, January 21, 1972. As is apparent from Senator Randolph's remarks, a very obvious and substantial purpose of this amendment was to benefit members of particular religious groups which suffered from sagging membership roles. The statutory purpose to foster religion could not be more clear.

Second, the reasonable accommodation provision has the direct and immediate effect of advancing religion. The law forces a union to discriminate in favor of individual employees on the basis of their religious beliefs by requiring the union to make special allowances for these individuals in contravention of its bona fide union security clause. The provision also imposes its burden on the other employees who are either nonreligious or of different religious persuasions than the accommodated employee. These individuals are forced to assume the accommodated employee's financial obligation to the union in order to keep the union solvent. The preferential effect is obvious; the provisions favor the religious over the nonreligious and advance particular religions. Cf: *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Zorach v. Clauson*, 343 U.S. 306 (1952).

Thirdly and lastly, the reasonable accommodation provision requires pervasive and excessive government

entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970). The provision necessarily violates this last criterion for both the EEOC and, subsequently, the courts are required to make a determination as to whether the belief asserted is to be characterized as a "religious" belief and whether such a belief, which may be outside a standardized creed, is protected under the law. In addition, these tribunals must determine whether these beliefs are not only sincere but also the actual basis for the refusal to pay union dues. See 44 Fordham L. Rev. 442, 449 n. 61 (1975). Political, ideological or philosophical reasons, no matter how strong, are beyond the protection of the reasonable accommodation provision.

In *National Labor Relations Board v. Catholic Bishop of Chicago*, ____ U.S. ___, 39 CCH S.Ct. Bull. P. B1560 (March 21, 1979) this Court held that there would be a significant risk of infringement of the Religion Clauses of the First Amendment to the United States Constitution if the National Labor Relations Board (N.L.R.B.) exercised jurisdiction over church-operated schools. This risk would occur because resolution of unfair labor charges by the N.L.R.B. would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at B1573. In addition, this Court stated that "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the *very process of inquiry* leading to findings and conclusions." *Id.* at B1573 [emphasis supplied].

In an identical manner with the N.L.R.B. in unfair labor practices cases, the EEOC and subsequently the courts in

reasonable accommodation cases must inquire into the good faith of the employee's alleged religious refusal to pay union dues. They must also determine whether the belief stems from some bona fide religion. As in the case of N.L.R.B. inquiries, the "very process of inquiry" by EEOC and the Courts presents a risk of violation of the rights guaranteed by the Religion Clauses of the First Amendment.

Significantly, in *Catholic Bishop of Chicago v. N.L.R.B.*, 559 F.2d 1112 (7th Cir. 1977), the Court of Appeals noted the similarity between the N.L.R.B.'s entanglement with religion in schools as compared with the EEOC's entanglement with religion under the reasonable accommodation provision of Title VII.

In the instant case, the EEOC, the District Court and the Court of Appeals have done exactly what this Court said would pose a risk of violating the First Amendment. The EEOC inquired into good faith of the respondent's position and subsequently issued a Right to Sue letter. The District Court's inquiry resulted in a holding that respondent's religious beliefs were not the basis for his refusal to pay union dues but rather that respondent was motivated by a general distrust of unions. The Court of Appeals made its own inquiry into the respondent's sincerity and religious beliefs and held that respondent's religious beliefs were the basis for his refusal to pay union dues. It is just this sort of inquiry, whether it be by the N.L.R.B., the EEOC or the courts, that this Court held may impinge on First Amendment rights.

Because the instant case and *Catholic Bishop of Chicago* parallel each other on the issue of government entanglement

with religion in violation of the First Amendment, *Catholic Bishop of Chicago* should control.

In *Gavin v. Peoples Natural Gas Co.*, ___ F.Supp. ___, 20 DLR D-1 (Lab. Rel. Rep. (BNA) (E.D. Pa. 1979), the District Court held that it could not proceed with the religious discrimination case before it without entangling the court with religious beliefs and thereby "abandoning the constitutionally-mandated 'hands-off' attitude in matters of religion and conscience." *Id.*, 20 DLR at D-6. The Court stated that it shuddered at the possibility of a "courtroom scene wherein experts would be cross-examined as to the legitimacy of a specific religious conviction." *Id.*, 20 DLR at D-6.

Significantly, in *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763 (C.D. Cal. 1977), on remand from the Ninth Circuit Court of Appeals, the District Court was unpersuaded by the majority of the Sixth Circuit in *Cummins*, and held that the religious provisions of the Civil Rights Act of 1964 violate the Establishment Clause of the First Amendment. *Yott*, like the case at hand, was concerned with firing of an employee for his refusal to join or contribute to the union.

In sanctioning union security clauses, Congress recognized that the need for stability in unions and labor must take precedence over an individual's religious beliefs against joining or contributing to a union. By requiring financial core membership only, the rights of these individuals are protected as much as possible. In *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953) Judge Learned Hand pointed out the need for these individuals to accommodate their religious beliefs in stating that:

The First Amendment protects one against action by the government . . . , but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations for a better world.

IV.

THE CREATION OF A DE NOVO REVIEW BY THE COURT OF APPEALS IN VIOLATION OF RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE ERRONEOUS NATURE OF THE DECISION BELOW REQUIRE THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO AVOID RECURRENT PROBLEMS

In construing Rule 52(a) F.R.C.P., this Court held in *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949) in affirming a lower court judgment on direct appeal, that, "[F]indings as to the design, motive and intent with which men act depend particularly upon the credit given to witnesses by those who see and hear them." *Id.* at 341.

In the instant case, the record testimony at the district court level is overwhelming that respondent distrusted unions. His distrust was not based upon his observance of this Union, but based upon his early childhood upbringing in Detroit. The

Union explored at great length the possibility of accommodation including some form of charity substitution. Respondent made no attempt to reply to the Union's offers but merely indicated that he did not trust unions. There is simply no justification for the Court of Appeals to ignore the finding of the District Court that respondent's distrust of unions made accommodation by this Union impossible. In doing so, the Court of Appeals gave no weight to the great advantage the District Court had in seeing, hearing and judging the credibility of the witnesses.

In addition, without the benefit of the trial record, the Court of Appeals adopted an erroneous finding of the District Court that respondent was willing, before the time of his termination, to give money to a charity. Respondent's testimony in the District Court that he would have given money to a charity through General Dynamics was in direct contradiction to his deposition testimony as well as to statements made by respondent to his Union shop committeeman. On cross-examination, respondent, in affirming his deposition testimony, acknowledged that he was not agreeable to a charity substitution at the time of his termination. The Court of Appeals failed to note this.

The Court of Appeals compounded its mistake by misapprehending the landmark decision of another panel of that court in *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974). In *Yott*, as in the instant case, an employee was terminated because he refused, for religious reasons, to pay union dues in violation of a valid union security agreement. In remanding the case to the District Court, the Court of Appeals expressed serious doubt as to whether any

accommodation was possible. The court noted that unlike "a refusal to work" situation in which a reasonable accommodation is easily provided, accommodating a member's objection to paying fees is a considerably more difficult task.

The Ninth Circuit specifically addressed the hardship caused by any accommodation which exempts an employee from paying dues. The court stated:

We are certain that the court will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share. "Free Riders" are discouraged. In effect stability is promoted by reducing potential labor strife, thus increasing the efficient operation of the business. *Id.* at 402, n. 6.

Thus it appears that the Ninth Circuit had precluded any accommodation which would allow a person to obtain the benefits of the union without paying his fair share of the substantial costs of collective bargaining. In the instant case, the Court of Appeals failed to recognize and acknowledge the very serious concerns which formed the basis for its prior decision in *Yott*.

This Court should exercise its supervisory powers not only to ensure that Rule 52(a) is respected in future Title VII religious discrimination cases, but also to correct the court's erroneous finding of fact concerning the charity substitution and to direct the court to re-examine its decision in *Yott*.

On January 8, 1979, certiorari was denied in *Southern Pacific Transportation Co. v. Burns*, 11 FEP Cases 1441 (DC

Ariz. 1976), rev'd, 589 F.2d 403 (1978), cert. denied, 99 S.Ct. 843 (1979), a case somewhat similar to the instant case. However, petitioner respectfully submits that the instant case is distinguishable from *Burns* in three key areas and therefore the denial of certiorari in *Burns* should have no impact on the instant petition for certiorari.

First, unlike the union in *Burns*, the Union in the instant case made several attempts to accommodate respondent. As stated previously in this petition, the Union representative met with respondent on several occasions to discuss possible accommodations including financial core membership or a charity substitution. Respondent adamantly refused both of those possibilities. It is important to note that petitioners were already accommodating respondent's inability to work on his Sabbath as well as on his special religious holidays. The fact that the Union in the instant case has clearly demonstrated a good faith attempt to accommodate respondent makes the instant case a far more appropriate case than *Burns* for this court's review of the reasonable accommodation provision of Title VII.

Secondly, the District Court in *Burns* found sufficient evidence that the employee's refusal to pay union dues was based on his sincere religious belief that the teachings of his Church prohibited him from joining or contributing to a labor organization. The Court of Appeals then accepted this finding.

On the contrary, the District Court in the instant case found that respondent's refusal to join or contribute to the Union was based on his general distrust of unions rather than on his religious beliefs. As noted earlier in this petition, the Court of

Appeals ignored this finding of the District Court and made its own inquiry into respondent's sincerity.

This factual difference between the *Burns* case and the instant case highlights the very type of inquiry into the sincerity of religious beliefs that this Court held in *Catholic Bishop of Chicago* was very likely to lead to a violation of the Religion Clauses of the First Amendment.

Finally, petitioners in *Burns* failed to raise the First Amendment argument that petitioners in the instant case have raised. In *Burns*, the union did not raise the First Amendment argument at the District Court level, attempted to raise it at the Court of Appeals level, but dropped it in their petition for certiorari.

On the contrary, the Union in the instant case properly raised, briefed and argued the First Amendment issue at the District Court and Court of Appeals levels as well as in this petition for certiorari. Unlike *Burns*, the instant case squarely raises the First Amendment argument for this Court's review. Given the fact that *Catholic Bishop of Chicago*, the most recent labor case dealing with the First Amendment issue, has been decided since the denial of certiorari in *Burns*, the significant differences between the petition for certiorari in *Burns* and the instant case are sufficient to warrant the granting of the petition.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

OLINS & FOERSTER

By: DOUGLAS F. OLINS

Counsel for Petitioner,
Silvergate District Lodge 50,
International Association of
Machinists and Aerospace
Workers, AFL-CIO

Appendices

FEB 10 1977
CLERK OF COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ANDERSON,) NO. 75-0857-S
Plaintiff,)
vs)
GENERAL DYNAMICS CONVAIR)
AEROSPACE DIVISION, a)
Corporation, and INTER-)
NATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE)
WORKERS, AFL-CIO,)
Silvergate District)
Lodge 50, An Association,)
Defendants.)
MEMORANDUM

APPEARANCES: For Plaintiff - Kevin J. McInerney,
San Diego, California

For Defendant,
General Dynamics - Ward W. Waddell, Jr.
San Diego, California

For Defendant,
Union - Douglas F. Olins,
San Diego, California

DENNEY, District Judge¹

This matter is before the Court for determination on the merits, subsequent to trial to the Court on February 2, 1977, and the submission of post-trial briefs. In accordance with Fed.R.Civ.P. 52(a), the Court makes the following findings of facts and conclusions of law.

¹United States District Judge, District of Nebraska, sitting by designation.

I.

Plaintiff, David Anderson, instituted this action on October 3, 1975, pursuant to Title VII of the 1964 Civil Right Act, against General Dynamics Convair Aerospace Division [hereinafter referred to as General Dynamics] and Silvergate District Lodge 50, International Association of Machinists and Aerospace Workers, AFL-CIO [hereinafter referred to as the Union]. The court has jurisdiction under the provisions of 42 U.S.C. §2000e-5(f) et seq., as amended March 24, 1972, and 28 U.S.C. §1343(4).

This case involves the termination of plaintiff by General Dynamics pursuant to the request of the Union, for his failure to join or contribute to the Union. Plaintiff claims a violation of Title VII of the Civil Rights Act of 1964, as amended, based upon defendants' failure to accommodate his religious beliefs. Plaintiff seeks reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, reasonable attorney's fees, costs and interest.

Anderson was employed on a regular basis by defendant, General Dynamics, from October 11, 1956, until June 16, 1972. At the time of his termination, plaintiff was a process tank loader and tender.

Since 1959, Anderson has been a member of the Seventh Day Adventist Church. Between 1959 and April 3, 1972, the collective bargaining agreement between defendants did not require General Dynamics to employ only those persons who were members of the Union. On April 3, 1972, the Union entered into an employment contract on behalf of represented employees with General Dynamics. Article 9, Paragraph B of the Agreement, provided as follows:

Any employee on the company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth

(30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above.

It is a tenet and principle of the Seventh Day Adventist Church, that its church members should not belong to any monopolistic business enterprise. Although the decision not to join or support a labor organization is left to the individual church member, Anderson has at all material times adhered to the conviction that joining or contributing to a labor union violates the principles and tenets of the Church. Anderson therefore did not join the Union within the time prescribed by the Union security clause.

On May 25, 1972, the Union notified plaintiff as to his delinquency relative to the requirements of the Union security provisions. Thereafter, on June 12, 1972, Anderson informed General Dynamics, who in turn informed the Union, that his religious beliefs prohibited him from joining the Union.² Two days later, the Union sent a letter to General Dynamics requesting that plaintiff be discharged for failure to join the Union. On or about June 14, 1972, upon receiving notice that he would be terminated unless he joined the Union, plaintiff again informed General Dynamics that his religious convictions would not allow him to join the Union. The parties have stipulated that neither [sic] defendant "offered any specific alternatives or accommodations with respect to joining the Union. Mr. Anderson was informed by both defendants that he had to follow the collective bargaining agreement and join the Union."³

On September 27, 1972, Anderson filed a Charge of Discrimination against both defendants with the Equal Employment Opportunity Commission. On November 6, 1972, the Commission deferred the complaint to the California Fair Employment Practice Commission.

²Exhibit D-1.

³Pre-trial conference Order §2, para. 21.

The matter was referred back to the Commission on December 6, 1972, and on April 12, 1974, decision was entered finding reasonable cause to believe that plaintiff's charge of discrimination was true and that plaintiff was entitled to relief. On July 15, 1975, the Commission notified plaintiff that conciliation efforts had failed and a "Notice of Right to Sue Within 90 days" was received by plaintiff on October 14, 1975.

II.

The principal issue before the Court is whether the defendants could have accommodated plaintiff's religious beliefs without undue hardship on their businesses.⁴

At the outset, it should be noted that Congress has sanctioned union security agreements as an integral part of our labor relations policy. The National Labor Relations Act, as amended by Section 8(a)(3) of the Labor Management Relations Act (Taft Hartley Act), 29 U.S.C. §158(a)(3), provides in relevant part:

[N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such

⁴Although both defendants have raised in their answers several legal defenses as a bar to plaintiff's action, the Court deems such defenses abandoned for failure to brief the issues pursuant to the Local Rules of the Southern District of California.

⁵Although plaintiff argued in his pre-trial brief that Section 8(a)(3) sanctions only agency shops and not union shops, this contention was withdrawn at pre-trial conference. The parties have agreed that the union security clause is valid and consistent with Section 8(a)(3) of the NLRA in that union membership is not a condition for acquiring employment, but merely a condition of continued employment. (Pre-trial Conference Order §III, para. 13). See *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734 (1963).

42 U.S.C. §2000e-2(a) provides in part as follows:

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . .

42 U.S.C. §2000e-2(c) provides in relevant part as follows:

It shall be an unlawful employment practice for a labor organization--

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

In 1972, Congress enacted 42 U.S.C. §2000e(j) which incorporated the substance of the 1967 E.E.O.C. guidelines found at 29 C.F.R. §1605.1:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Although Section 8(a)(3) of the NLRA and Title VII collide in cases such as presented herein, the Ninth Circuit has held that when a union security clause conflicts with freedom of religion, reasonable accommodation is required. *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 402 (9th Cir. 1974). This Court is therefore squarely presented with the difficult task of balancing the rights and interests of the parties.

Defendants initially argue that plaintiff has failed to meet his burden of proof, inasmuch as he did not offer General Dynamics any suggested accommodation prior to termination. Although defendants correctly state that Judge Manuel Real placed the burden

of initiating accommodations discussions with the employee in *Yott v. North American Rockwell*, ___ F.Supp. ___ (C.D. Calif. 1977) (on remand), the Ninth Circuit specifically held in *Yott* that "if a reasonable accommodation can be reached between the parties, it must be offered appellant Yott. . . ." 501 F.2d at 402, n. 6. On the other hand, plaintiff argues that he is entitled to judgment as a matter of law, since it is stipulated that neither defendant tendered plaintiff an offer of accommodation.⁶

The Court is impelled to reject the contentions of both parties. The controlling question does not turn on subtle procedures which require a party to come forward with an offer of accommodation prior to termination;⁷ the touchstone of religious discrimination under the Act is whether a reasonable accommodation can, in fact, be reached between the parties without undue hardship. It would be anomalous to compel an employer and union to accommodate an employee's religious beliefs, regardless of hardship, simply because the employer failed to offer the employee any accommodations prior to his termination, regardless of whether, in fact, a reasonable accommodation is available. This result would not only be contrary to logic, but in direct conflict with the statutory command which exonerates "an employer who demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j).

⁶The Eighth Circuit held in *Hardison v. TransWorld Airlines, Inc.*, 527 F.2d 33, 39 (8th Cir. 1975) cert. granted ___ U.S. ___ (1976), "[b]efore an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate."

⁷A common sense interpretation of the Act dictates a conclusion that the employer is required to initiate a conference with employee prior to termination to discuss possible accommodation to the employee's religious beliefs. An acceptance of defendants' position would defeat the conciliation powers of the Commission. See 29 C.F.R. §1601.22.

The parties have stipulated that Anderson "had made known to his fellow workers, including his shop committeeman, the fact that he would not join and/or support the Union except if he could insure that his contributions went to a recognized charity that met with his approval.⁸ Plaintiff testified that he told the Union committeeman, Joe Mattson, prior to his termination that he did not mind paying the equivalent of Union dues if he could give it directly to a charity. Plaintiff further stated that he would not make payments for a charity to the Union because he doesn't trust unions. The following statement from Anderson's deposition is particularly relevant:

Anyhow, the committeeman told me, "what about, you know, paying union"--not paying union dues, less so much of my money be taken out of my check and go to charity. And I told him the same thing I'm telling you now, that they tells you that but they don't do that. So I told him, "I don't mind paying the union dues or paying the fee in the same amount, but I would not, you know, let the union do it."⁹

In *Yott v. North American Rockwell Corporation, supra*, the Ninth Circuit reversed the dismissal of plaintiff's complaint and remanded the case to the district court for a determination of whether a reasonable accommodation without undue hardship could be reached. In a footnote, the court described the remand:

[W]e leave analysis of whether the "business necessity" test would be met for the District Court's determination. We are certain that the court will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share. "Free riders" are discouraged. In effect, stability is promoted by reducing potential labor

⁸Pre-trial Conference Order, §III, para. 25.

⁹Deposition III:20-26.

strife, thus increasing the efficient operation of the business. 501 F.2d at 402, n. 6.¹⁰

Although the law in some circuits is unsettled as to whether hardship to the union, as well as to the employer, can be considered,¹¹ the law in this circuit mandates that the inquiry on hardship include hardship to the union. *Yott v. North American Rockwell Corp., supra* at 403.

In consideration of the above authorities and the interests of the parties, the Court must conclude that anything less than payment of the equivalent of dues to the Union for charitable purposes would impose an undue hardship on the Union. Nonpayment of dues or the equivalent deprives the Union of money needed in order to negotiate on behalf of employees and to which it is entitled for services rendered.¹² Plaintiff's refusal to give the equivalent of dues to the Union to be earmarked for a recognized charity of his own selection was based on his general distrust of unions, rather than on religious beliefs. The willingness of plaintiff to pay money directly to a charity does not eliminate "free riders."¹³ The overriding interest of the

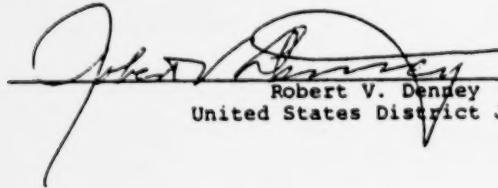
Union in carrying out its bargaining function with sufficient funds makes an accommodation impossible, given plaintiff's unyielding position.¹⁴

Since the Court holds that an accommodation is impossible under the circumstances of this case, it is unnecessary to reach defendants' claim that Title VII violates the Establishment Clause of the First Amendment.

Judgment shall be entered for defendants.

Dated this 15th day of February, 1977.

BY THE COURT



 Robert V. Denney
 United States District Judge

¹⁰The court also expressed doubt as to whether any accommodation was available, upon the assumption that appellant, like Anderson, may not desire to pay an amount equal to union dues to the union.

¹¹See, e.g., separate opinions or [sic] Judge Gee, Judge Brown and Judge Rives, in *Cooper v. General Dynamics, Convair Aerospace Division*, 533 F.2d 163 (5th Cir. 1976).

¹²Although not dispositive, the Court notes that plaintiff has on two occasions utilized the Union's grievance procedure to secure reinstatement in 1962 and 1968 when terminated because he refused to work on the Sabbath of his church.

¹³See S. Rep. No. 105 on S. 1126, 80th Cong. 1st Sess. 7 (1947).

¹⁴It should be noted that the Union donates money to charities in the amount of approximately 36¢ per year for each member.

A-10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ANDERSON, Plaintiff, } NO. 75-0857-S
vs } JUDGMENT
GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a Corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Silvergate District Lodge 50, An Association, Defendants. }

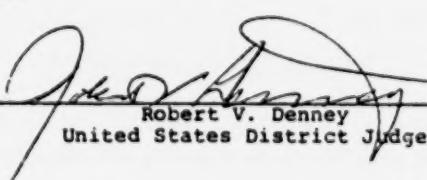
In accordance with the Memorandum Opinion filed contemporaneously herewith,

IT IS HEREBY ORDERED that judgment be entered for defendants, each party to pay their own costs.

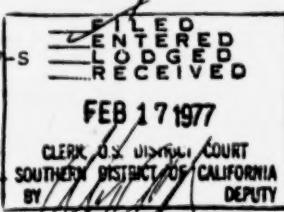
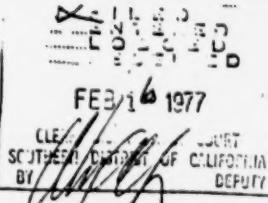
IT IS FURTHER ORDERED that the motion of defendant, International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, An Association, for summary judgment is denied as moot.

Dated this 15th day of February, 1977.

BY THE COURT



Robert V. Denney
United States District Judge



B-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ANDERSON, Plaintiff-Appellant, v. GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, an association, Defendants-Appellees. }

No. 77-2180

OPINION

RECEIVED SEP 11 1978
FILED SEP 7 - 1978
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Southern District of California

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS,* District Judge

HUFSTEDLER, Circuit Judge:

Anderson, a former employee of General Dynamics Convair Aerospace Division ("General Dynamics") brought this Title VII action against General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50 ("Union"), claiming that he had been discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e(j)). He sought reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him,

*Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

back pay and allowances, reasonable attorney's fees, costs and interest. The district court held that no accommodation to Anderson's religious beliefs was possible because his offer to contribute the amount of Union dues to a charity of his choice, rather than to the Union or charities of the Union's choice, imposed an undue hardship on the Union. (*Anderson v. General Dynamics Convair Aerospace Division* (C.D. Cal. 1977) 430 F. Supp. 418.)

The critical issue on appeal is whether the Union carried its burden of proving that it could not reasonably accommodate Anderson's religious convictions without undue hardship on the Union. We conclude that it did not carry its burden of proof.

Anderson was first employed by General Dynamics on October 11, 1956. In 1959, he became a member of the Seventh Day Adventist Church. A tenet of the Church is that its members should not belong to or contribute to labor organizations. Anderson has at all material times held a sincere belief in that tenet. From 1959 until April 3, 1972, the collective bargaining agreement between General Dynamics and the Union did not require General Dynamics to employ only // persons who were union members. On April 3, 1972, however, the Union and General Dynamics entered into a collective bargaining agreement, which contained the following provision:

"Any employee on the Company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above."

Anderson did not join the Union within the time limitation provided by the security clause of the bargaining agreement. On May 25, 1972, the Union notified Anderson of his delinquency under the agreement. On June 12, 1972, Anderson informed General Dynamics,

which, in turn, informed the Union, that his religious beliefs prohibited him from joining the Union. Two days later, the Union requested that Anderson be discharged for failure to abide by the provisions of the security clause. On June 16, 1972, General Dynamics discharged Anderson from his employment for the sole reason that he refused to become a member of or contribute to the Union.

The parties stipulated that neither the Union nor General Dynamics offered Anderson any specific alternatives or accommodations with respect to joining the Union, and both the Union and General Dynamics told Anderson that he had to follow the collective bargaining and join the Union. The parties also stipulated that Anderson had made known to his fellow workers, including his shop committeeman, that he would not join the Union and that he would not contribute to the Union, unless he could insure that his contributions went to a recognized charity.

Anderson promptly filed a complaint with the Equal Employment Opportunity Commission, which deferred the matter to the California Fair Employment Practice Commission ("FEPC"). The FEPC referred the case back to the EEOC. After finding reasonable cause to believe that Anderson's discrimination charge was well-founded, the EEOC attempted conciliation. When conciliation failed, EEOC issued a right to sue letter on October 5, 1975. Anderson timely filed a complaint in the district court. The district court rendered judgment against him, and he appeals.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides in pertinent part as follows:

"It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . ."

Similar conduct by a labor organization is also proscribed by the Act. (42 U.S.C. § 2000e-2(c).)^{1/}

In 1972, Congress enacted 42 U.S.C. § 2000e(j), incorporating the substance of the 1967 EEOC guidelines (29 C.F.R. § 1605.1). The section provides:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

As the Supreme Court has explained, in *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 74: "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer [and also for a union] not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."

1. Section 2000e-2(c) provides as follows:

"It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

Neither Congress nor the EEOC has attempted to spell out any precise guidelines for determining when the "reasonable accommodations" requirement has been met, nor the kinds of circumstances under which a particular accommodation may cause hardship that is "undue." These decisions must be made in the particular factual context of each case because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case. (*Redmond v. GAF Corp.* (7th Cir. 1978) 574 F.2d 897, 902-03; *Williams v. Southern Union Gas Co.* (10th Cir. 1976) 529 F.2d 483, 489. Cf. *Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. at 74-75.)

We, as well as other courts, have recognized that there is both tension and conflict between the legitimate interests of the Union in preserving the benefits of union security agreements, which are valid under the National Labor Relations Act (29 U.S.C. § 158), and the accommodation requirements of Title VII (e.g., *Yott v. North American Rockwell Corporation* (9th Cir. 1974) 501 F.2d 398; *McDaniel v. Essex Intern'l, Inc.* (6th Cir. 1978) 571 F.2d 338; *Cooper v. General Dynamics, Convair Aerospace Division* (5th Cir. 1976) 533 F.2d 163, 166-69). The balance has been struck, however, in favor of the elimination of discrimination in employment practices and requiring accommodation of religious practices absent proof by the Union, the employer, or both, that reasonable accommodation cannot be made without an undue hardship to the Union or to the employer. (*Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. 63; *McDonald v. Santa Fe Trail Transportation Co.* (1976) 427 U.S. 273; *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747.)

To establish a *prima facie* case of discrimination under §§2000e-2(a)(1) and (j) Anderson had the burden of pleading and proving that (1) he had a bona fide belief that union membership and

the payment of union dues are contrary to his religious faith;^{2/} (2) he informed his employer and the Union about his religious views that were in conflict with the Union security agreement; and (3) he was discharged for his refusal to join the Union and to pay union dues. (*E.g., Yott v. North American Rockwell Corp., supra*, 501 F.2d 398; *Redmond v. GAF Corp., supra*, 574 F.2d at 901.)^{3/} Both by stipulations of fact and by evidence introduced at trial, Anderson established his *prima facie* case.

The burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship. *Id.* at 902.

2. We have no occasion in this case to determine the breadth of the "beliefs" or "practices" protected by section 2000e(j) or to grapple with bona fides of a particular employee's religious convictions. Both of these facts are conceded for the purpose of this case. We are aware, however, of the Supreme Court's admonition in *Fowler v. Rhode Island* (1953) 345 U.S. 67, 70 that "it is no business of courts to say . . . what is a religious practice or activity. . . ." *See also Redmond v. GAF Corp., supra*, 574 F.2d at 900.

3. We agree with the Seventh Circuit that the employee who has provided his employer with sufficient information to put it on notice of his religious needs is not required, as part of his *prima facie* case, to show that he thereafter made some efforts either to compromise or accommodate his own religious beliefs before he can seek an accommodation from his employer. (*Redmond v. GAF Corp., supra*, 574 F.2d at 901-02 ("While we feel plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof." *Id.* at 901.)

Neither the Union nor General Dynamics did anything to accommodate Anderson's religious beliefs. They contend that their failure to take any steps to accommodate is excused because Anderson insisted on making an equivalent payment to a charity of his choice, rather than paying the equivalent fund to the Union for charitable purposes. They rely heavily upon the district court's finding that Anderson's refusal to pay his charitable contribution to the Union was based on his general distrust of unions, rather than on religious beliefs. Finally, they argue that Anderson's suggestion of accommodation would work undue hardship as a matter of law because Anderson would become a "free rider."

The burden was upon the appellees, not Anderson, to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation. Thus, Anderson's motivation in selecting his own charity is irrelevant. Moreover, the district court's finding is contrary to the parties' stipulation of fact that teachings of Anderson's Church forbade making contributions to unions.

Appellees are left with the argument that Anderson's refusal to pay either his union dues or the equivalent of union dues to the Union for a charity of the Union's choice would be an undue hardship as a matter of law because the means of accommodation would create "free riders." The district court accepted this argument; we do not. We follow the Sixth Circuit in *McDaniel v. Essex International, Inc., supra*, 571 F.2d 338, with which our case is almost identical.

McDaniel was a Seventh Day Adventist who had a bona fide religious belief that membership in the union and the payment of union dues was a violation of her religion. She requested her employer and the union to make an accommodation to her religious beliefs, and she suggested that she would be willing to contribute an

amount equal to the union dues to a non-sectarian charity to be chosen by the union and her employer. Neither responded to her request, and she was discharged for her failure to adhere to the requirements of the union security agreement. The district court granted summary judgment in favor of the union and the employer, accepting their contentions that the accommodation that the employee suggested would work an undue hardship on the union as a matter of law because non-payment of union dues adversely affected the "financial core" of the union and thus impaired its ability to fulfill its collective bargaining functions. The *McDaniel* court reversed. The court pointed out that the union security provisions of the Taft-Hartley Act (29 U.S.C. § 158(a)(3), (b)(2) (1970)) "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees. [citations omitted]. The burden is on Essex and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship. The district court found that it would work an undue hardship on IAM to forego the dues payment by the plaintiff. There is no factual basis in the record for this conclusion. In *Draper v. U.S. Pipe & Foundry Co.*, *supra* [(6th Cir. 1976) 527 F.2d 515], this court expressed its skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice. 527 F.2d at 520." (*Id.* at 343.)

Here, as in *McDaniel*, neither the Union nor the employer offered any evidence to prove that union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply upon general sentiment against free riders.

Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship. As the Supreme Court pointed out in *Franks v. Bowman*, *supra*, 424 U.S. at 775, quoting *United States v. Bethlehem Steel Corp.* (2d Cir. 1971) 446 F.2d 652, 663: "'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.'"^{4/}

We conclude that the Union and General Dynamics failed to carry their burden of proof, and, accordingly, the judgment must be reversed.^{5/} We also conclude that Anderson is entitled to a reasonable attorney's fee as part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), the amount of which shall be fixed by the district court on remand.

Reversed and remanded for further proceedings consistent with the views herein expressed.

4. Appellees can take no comfort from the observation in *Yott v. North American Rockwell Corp.*, *supra*, 501 F.2d at 403: "If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or the employer's business, then Yott's discrimination claim should fail." We reversed in *Yott* because the appellees had not demonstrated that the suggested accommodation would impose undue hardship, and, as we have explained, the appellees in this case have not done so either.

5. The appellees attacked the constitutionality of the provisions of Title VII in issue in this case, and they renew that attack, at least obliquely, on appeal. The district court did not reach any constitutional issue, and under these circumstances we also decline to address any constitutional questions.